

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 54

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3 FREDERICK ISEMAN, Index No.
4 Plaintiff, 655552/23

5 -against-

6 MICHAEL HECHT, LISE MOTHERWELL, CLIFFORD ROSS,
7 HELEN FRANKENTHALER FOUNDATION, INC.,

8 Defendants.

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10 PROCEEDINGS 60 Centre Street
11 New York, New York
September 10, 2024

12 B E F O R E:

13 HONORABLE JENNIFER G. SCHECTER,
14 JUSTICE

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OFFICIAL COURT REPORTER

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1 MS. KAPLAN: So, for plaintiff Frederick
2 Iseman, Roberta Kaplan from the Kaplan Martin firm. The
3 address is 156 West 56th Street, New York New York. I'm
4 here with my partner, Christopher LeConey who may be
5 arguing portions of the argument today.

6 MS. NEUNER: This is Lynn Neuner, N-e-u-n-e-r.
7 I'm here together with my partner, Meredith Karp, which
8 is K-a-r-p. We're both from Simpson Thacher & Bartlett
9 LLP. The address is 425 Lexington Avenue, New York, New
10 York 10017. We represent the Helen Frankenthaler
11 Foundation Inc. and I will be arguing the Foundation's
12 motion to dismiss while Ms. Karp will be arguing motion
13 sequence number 2 which is regarding reasonable
14 parameters on investigations.

15 MR. DONTZIN: I'm Matthew Dontzin. Matthew, two
16 T's, middle initial S, and I'm with the law firm of
17 Dontzin, Nagy & Fleissig. We're at 31 East 62nd Street,
18 New York City 10065 and I'm here with my partners Jason
19 Kolbe, K-o-l-b-e, and David Fleissig, F-l-e-i-s-s-i-g,
20 and we're here on behalf of the directors of the
21 foundation. Thank you.

22 THE COURT: Good afternoon, everyone.

23 MS. NEUNER: Good afternoon, your Honor.

24 THE COURT: I hope you're all doing well. Let's
25 get started.

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1 I have in front of me three motions today and
2 two of them are motions to dismiss and another one has to
3 do with investigatory measures that have been taken. I
4 really want to be laser focused today on the issue of
5 standing.

6 My question is, I think it's for Ms. Kaplan. I
7 don't know whether it's for Ms. Kaplan or is it Mr.
8 LeConey. It's going to be Ms. Kaplan.

9 MS. KAPLAN: I think it's for me, your Honor.

10 THE COURT: Okay. Terrific. So, why here,
11 based on the bylaws, why isn't this a situation where the
12 documentary evidence, which specifically is the bylaws,
13 the meeting minutes, even, I'll even say one e-mail,
14 which we can discuss, why doesn't that utterly refute the
15 claim that he was improperly terminated as opposed to
16 that he wasn't reelected in accordance with the bylaws?

17 MS. KAPLAN: So, your Honor, first of all, in
18 accordance -- I'm going to hold for a second because I
19 understand your Honor's question is why this kind of
20 evidence, why these kind of documents are inappropriate
21 under 3211(a)1 and, while I'm not aware of a single case
22 in which the Appellate Division or the Court of Appeals
23 has affirmed dismissal under 3211(a)1 on a record that
24 looks anything like this, but I'll hold that out because
25 your Honor is aware of those arguments. I can make those

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1 secondly.

2 Going straight to the merits. Under the
3 Foundation's bylaws, Mr. Iseman could only be removed as
4 a director for cause.

5 THE COURT: One moment. Under the bylaws or
6 under the law? Because the bylaws, I think, actually say
7 he can be removed without cause.

8 MS. KAPLAN: No, I think here they say with
9 cause, your Honor, but it's also under New York law.

10 THE COURT: New York law I got but I was very
11 curious because I did think that I saw in the bylaws that
12 it just said he can be voted out by a majority with or
13 without cause, but I can look at my highlights. Hold on.
14 I don't know that it matters. To be sure.

15 MS. KAPLAN: It's Article 3, Section 4, your
16 Honor. It says a director may be removed for cause by a
17 vote of the majority of the board of directors.

18 THE COURT: One moment, because mine says,
19 unless I'm reading the wrong bylaws, any officer elected
20 or appointed by the board of directors may be removed by
21 the vote of the majority, either with or without cause.

22 Am I in the wrong bylaws? This is docket 28.

23 MS. KAPLAN: I'm looking at Document 50, which
24 is the amended bylaws dated September 26, 2018.

25 THE COURT: Okay. I was looking at an earlier--

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1 although mine says amended and restated. What was your
2 date?

3 MS. KAPLAN: 2018.

4 THE COURT: So does mine. Okay, hold on one
5 second. I was looking at docket 28 but, you know what,
6 it doesn't even matter to me. I will even take it
7 because I think the law says for cause. I will accept
8 that. I will accept the argument for purposes of
9 argument.

10 Go ahead.

11 MS. KAPLAN: Okay. So, I don't think we need
12 to get there, your Honor, because --

13 THE COURT: Agreed. It doesn't matter.

14 MS. KAPLAN: Mr. Iseman was not removed from
15 the board for that process, instead they claim he was not
16 reelected and a reelection or non-reelection can occur
17 without cause. Here's the problem with that, your Honor.

18 First of all, the bylaws explicitly provide that
19 the annual meeting will be the first meeting following
20 the beginning of the corporation's fiscal year unless
21 otherwise fixed by the law. That is by law Article 3,
22 Section 6.

23 The April 21, 2023, meeting was, in fact, the
24 first meeting of the fiscal year that year and the board
25 itself did not otherwise fix the annual meeting for

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1 another date.

2 THE COURT: One moment. Ms. Kaplan, was there
3 an election of directors at that April meeting?

4 MS. KAPLAN: There was not, your Honor, but
5 that was not uncommon and the bylaws provide that when
6 there wasn't an election, that the directors would
7 continue. I can give you a cite for that, your Honor.
8 It's bylaws Article 3, Section 2.

9 THE COURT: Okay, because I'm there. The
10 directors will be elected at the annual meeting, the
11 board of directors, by a majority of directors then in
12 office, and each director will hold office until the next
13 annual meeting and the election or appointment of
14 qualification of the director successors and then it goes
15 on and talks about unless there's earlier death,
16 resignation, or removal and it says that the expiration
17 of any term, any director may be reelected.

18 So, it's clear that there is an annual meeting
19 every year, and I think there's a provision that talks
20 about the term of the members being for a year until the
21 annual meeting but, yes, this is Article 5, Section 2,
22 the officers will be elected annually.

23 So, the officers of the corporation will be
24 elected annually by the board of directors at the annual
25 meetings --

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1 MS. KAPLAN: Officers, your Honor. Not
2 directors.

3 THE COURT: Okay. So, the officers will be
4 elected annually and the directors be elected at the
5 annual meeting by a majority of directors then in office,
6 right. But what made this -- the April meeting was the
7 first meeting and yes, there was a financial report at
8 that meeting, but, your client acknowledged that that
9 wasn't the annual meeting, as in, when there was a
10 message that went out that said "we didn't have our
11 annual meeting. We're doing it in May," your client said
12 "I want the agenda" and then your client showed up at the
13 meeting and voted for the directors, in fact.

14 MS. KAPLAN: No. That is incorrect, your
15 Honor. That happened before my client-- either before
16 the resolution that was the annual meeting happened
17 before my client got on and the statement that electing
18 the members, he was already on but he wasn't voted on.

19 The point, in the beginning of that meeting, if
20 you look at the minutes for yourself, the statement that
21 it was recognized as the board -- was to recognize the
22 meeting as the annual meeting for the board of 2023 is on
23 page 2 and that's before Mr. Iseman joined the video
24 conference.

25 THE COURT: But he got notice that it was the

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1 annual meeting before and he sent an e-mail that said
2 "can I have an agenda for the annual meeting." It wasn't
3 exactly in those words but he sent an e-mail saying "send
4 me the agenda for annual meeting." Again, not using
5 those exact words, but, even if he wasn't there for the
6 resolution that this is the annual meeting, he voted for
7 the rest of the directors at that meeting.

8 MS. KAPLAN: Yes. But, your Honor, that was
9 done after they came up with the plan to say that this
10 was going to be the annual meeting, had that vote before
11 Mr. Iseman entered, sent Mr. Iseman an e-mail one or
12 two days before without any notice or any clear statement
13 that we're going to ignore the first meeting as the
14 annual meeting and treat this one as the annual meeting
15 instead.

16 There's nothing in the e-mails that say that;
17 and, at the original meeting, and your Honor noted, it
18 was consistent with the annual meeting. The financial
19 presentation was made. So, Mr. Iseman would have had no
20 reason, since he wasn't aware of these plans to
21 "un-reelect" him. The whole point of putting these words
22 in the e-mail was to continue with their scheme to get
23 him off the board.

24 THE COURT: Wait, but they told him in advance
25 they were going to un-reelect him. Not the first notice,

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1 to be sure, but they even told him in advance of the
2 meeting, we're not planning to reelect you. If you want
3 to step down, step down.

4 MS. KAPLAN: The day before at 4:51 p.m., they
5 served notice.

6 THE COURT: Well, he got notice that it was going
7 to be the annual meeting even before that. I don't
8 understand how there can be an argument here that he
9 didn't have notice that it was the annual meeting. He
10 showed up and he took play to heart in the vote.

11 MS. KAPLAN: The vote that was the annual
12 meeting took place before he entered the room. That was
13 highly unusual.

14 THE COURT: No, no, for the board I'm talking
15 about.

16 MS. KAPLAN: I understand but the point it was
17 an annual meeting which then gave them the right to
18 un-reelect him from the board, supposedly, that happened
19 before he was on the call. Yes, are there a couple of
20 e-mails a day or two before that one, the most-- the one
21 your Honor pointed out, late in the afternoon the day
22 before that said these things? Of course, but that is
23 not notice.

24 It's certainly not sufficient notice. It
25 certainly never says we're going to ignore the first

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1 meeting as the annual meeting and make this the annual
2 meeting. We changed our mind.

3 THE COURT: They said-- they sent him an e-mail
4 saying it's the annual meeting and he said, "can I please
5 have the agenda." That was before the e-mail where they
6 told him, we're not planning to reelect you.

7 MS. KAPLAN: He had no basis at this point to
8 understand they were hanging their hat on the difference
9 between the annual meeting and regular meeting.
10 Mr. Iseman was participating as a responsible board
11 member. He wanted the minutes. He wanted to be
12 involved.

13 He didn't know he'd be excluded at the beginning
14 of the meeting in which they decided to make this the
15 annual meeting. There is no evidence in the record,
16 whatsoever. This is what discovery is about, about what
17 Mr. Iseman did and said in those days for Mr. Iseman.

18 That is why 3211(a)1 is completely inappropriate
19 here. Looking at a series of exchanges self-written,
20 unsigned, really, by the defendants without anything from
21 the other side. That is why we have discovery. That is
22 why we don't do this on motions to dismiss under 3211(a)1
23 and one thing I can clearly say is that Mr. Iseman could
24 hardly have been clearer for weeks and weeks and weeks
25 leading up to this, from testing what was going on with

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1 the board, from testing the plans to get rid of the
2 foundation altogether.

3 The first time they raised this, this is in
4 response to the second time they raise it and Mr. Iseman
5 could hardly have been-- he's not exactly a shy donor,
6 your Honor. He couldn't have been more vociferous. Had
7 he known they would come up with this crafty plan, they'd
8 have a board meeting before he gets on saying we'll call
9 this the annual meeting, even though the financial
10 presentation was at the other one and then to un-reelect
11 him, no.

12 THE COURT: Ms. Kaplan, he got an e-mail saying
13 it's the annual meeting. The fact that he was late to
14 the meeting and missed the resolution doesn't change --

15 MS. KAPLAN: It was --

16 THE COURT: One moment.

17 MS. KAPLAN: He was --

18 THE COURT: It doesn't even matter. That
19 doesn't even matter. I will withdraw. I don't care when
20 he joined the meeting. The point is, in advance of the
21 meeting, he was told this is the annual meeting. He
22 said: "Send me annual meeting agenda and/or agenda
23 please, including annual meeting."

24 These are his own words and then he did show up
25 at the meeting and voted for directors. I just don't see

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1 how that-- I don't see what discovery would reveal or
2 what's necessary. He had notice. He actually showed up.
3 The bylaws say, even if it's deemed not to be a meeting
4 at a fixed time by the bord, and they did fix the time
5 and they did tell him in advance it was going to be the
6 annual meeting, there is also a provision that says if
7 you show up at the meeting, you waive. If you attend
8 without protest, prior thereto or at its commencement,
9 the lack of notice is waived.

10 MS. KAPLAN: We're not talking about notice for
11 a meeting. We're talking about the notice the meeting is
12 going to be at 2:00 the next day for people to
13 participate. That is what that talks about. This is
14 about a scheme that the other defendants -- and you can
15 look at their e-mail. Let's look at the e-mail Ms.
16 Motherwell says all the things she plans on doing that
17 she delivered 4:51 the night before.

18 She says, this is the annual meeting. We're
19 going to unelect you. The vote doesn't require reason.
20 Incorrect. We believe it's in the best interest of
21 foundation. We've voiced our concerns. None of those
22 materials, none of the voicing of concerns, none of their
23 discussions, none of how Mr. Iseman reacted to that, none
24 of that, not an ounce of it is in the record; and, if I
25 am correct, which we believe we will show in discovery,

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1 that this was a secret plan hatched by the other
2 directors to recall the first meeting because we have no
3 record here that any other meeting any other year was
4 renamed the annual meeting after it already took place,
5 never happened.

6 So, he'd have no reason to think that that was
7 an issue. If I'm correct, that is what they did to stop
8 his vociferous objections to getting rid of this
9 foundation that holds the works and legacy of his aunt's
10 artwork. I'm entitled to discovery to show that if they
11 want to bring that issue up again on a full record when I
12 get documents, when I get depositions, when my client has
13 an opportunity to put in an affidavit, they can remake
14 the motion then but on this record under 3211(a)1, there
15 is not a single case that comes anywhere near this.

16 In fact, with all the redactions that's not a
17 case that grants a 3211(a)1 motion with redactions. The
18 courts say no. No. I'm not telling you that, your
19 Honor, because your Honor will be wise to it, can
20 ultimately maybe find that the process was proper here,
21 but there's enough smoke, given what we said, given the
22 documents, they wrote all the documents themselves, given
23 there was nothing signed by Mr. Iseman, and given the
24 very slapdash, last minute way that they did this, for
25 you to conclude, without discovery, that it was Kosher,

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1 it was proper, and it wasn't part of an improper scheme
2 to get rid of Mr. Iseman because he was objecting to the
3 end of this foundation, which was exactly what, not only
4 the article talks about but exactly what New York
5 not-for-profit law talks about.

6 THE COURT: What if I -- again, I look at the
7 bylaws and they say that annual meetings will be held at
8 such time and places as fixed by the board of directors.
9 It also says, unless otherwise fixed by the board of
10 directors, the annual meeting will be the first meeting
11 following the beginning of the fiscal year, but, again,
12 here, he has advance notice that it is an annual meeting.

13 He writes back acknowledging it's an annual
14 meeting, asking for the agenda. He shows up. He votes
15 for the directors. He doesn't get reelected. They then
16 also vote to decrease the number of officers on the board
17 and make it a three or a three-member board; but, in any
18 event, if I were to find that what they did was
19 consistent with the bylaws, as a matter of law, where
20 does it leave your client in terms of this case?

21 MS. KAPLAN: I don't believe it's consistent
22 with the bylaws, your Honor. The bylaws do not success
23 you can have the meeting, the first meeting after the
24 start of the fiscal year and then retroactively say that
25 is not the annual meeting. We decided we'll have a

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1 second meeting four weeks later, and there is no evidence
2 in the record of any separate meetings four weeks later
3 ever in the history of this foundation.

4 THE COURT: Ms. Kaplan, when he got notice that
5 it was going to be the annual meeting and asked for an
6 agenda, did he say "wait a minute. We just had the
7 annual meeting. Why are we having another annual meeting
8 in May?"

9 MS. KAPLAN: It was four weeks. Mr. Iseman,
10 within a 48-hour period was given notice of this plan.
11 Did he have time to consult with his lawyers and look at
12 the bylaws? No. He trusted his fellow directors; and,
13 he trusted, since he cared about the foundation, that
14 they'd have a meeting that would discuss the best
15 interest of this foundation and Ms. Frankenthaler's
16 legacy.

17 In this situation where these kind of issues are
18 at stake, to suggest there was proper notice in three or
19 four e-mails, all of which came to Mr. Iseman in a
20 48-hour period and he was supposed to understand the word
21 annual in the e-mail was supposed to jump out of him and
22 mean it is not only the election, even though we now know
23 they were all conspiring to do that behind his back --

24 THE COURT: They told him they basically
25 conspired as in first they tell him it's going to be the

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1 annual meeting. He writes back and says "give me the
2 agenda." They sent an agenda saying directors are going
3 to be elected and shortly before the meeting, they tell
4 him we want to let you know, all three of us we are
5 going-- we are not going to reelect you.

6 MS. KAPLAN: Let me ask you this question.
7 What if, in discovery, we were to find an e-mail or text
8 on the other side that says "hey guys, we really have to
9 get rid of Fred. He's really difficult. He doesn't like
10 what we want to do. He wants the foundation to exist and
11 know what, here's the way -- by the way, we found a
12 lawyer who came up with a crafty idea and the crafty idea
13 our lawyer came up with, guys, is we take the first
14 meeting that happened three weeks ago, we recall it
15 something else, and redesignate it as not the annual
16 meeting.

17 He'll never understand that because we never had
18 meetings like this in the past. He will think that
19 something has come up and when we un-reelect him from the
20 board -- sorry, your Honor, under New York condo law and
21 under the principal, that would establish standing for
22 Fred Iseman.

23 To do it here on a record where we don't get any
24 discovery where it's really clear, even from the
25 documents that we have, that something was up. Look, for

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1 example, your Honor, at the minutes. The minutes of May,
2 you can tell from the documents, were not produced. I
3 mean, the minutes in April were not produced sometime
4 until May.

5 The reason that's true is because it's all part
6 of the same plan. They came forward. They didn't like
7 what Mr. Iseman had to say at the April meeting; and. In
8 a period of three or four weeks, behind his back, they
9 hatched this plan.

10 If there is discovery documents that say that,
11 which I'm sure there are, then that establishes standing,
12 not only under the strict rules of these bylaws and of
13 his status as director and we cited cases when directors
14 were pushed out in an improper way and not establishing
15 standing but, clearly, it establishes standing under the
16 public interest standing doctrine.

17 There is no one else available to stand for the
18 future of this foundation and to make sure that it isn't
19 transferred, all the artwork isn't sold off in the next
20 three years so that the public and everyone else doesn't
21 get to appreciate what Ms. Frankenthaler did.

22 THE COURT: All right. So, again, though, let's
23 put that aside. I hear your argument. What if I don't
24 find that there was any deviation from the bylaws or that
25 the bylaws authorized this type of mechanism in terms of

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1 there hadn't been an election before. They're supposed
2 to have elections every year. It's been more than a
3 year, a notice that they're going to have an election.
4 There is-- your only-- your term is until the next
5 election and so I even would wonder, like, by now, if
6 they've had even another.

7 I don't know if they've had another election or
8 not but the point is there is a set term.

9 MS. KAPLAN: Excuse me for interrupting. That
10 is exactly why we get discovery. That is exactly why you
11 said you didn't know whether there was another meeting or
12 not. That is exactly why. It's missing a case. Under
13 3211(a)1 it is completely improper.

14 We're entitled to find out what is the history
15 of the meetings here. How do elections happen? Were
16 there times in the past where people just rolled over and
17 there were no elections? Where there ever annual
18 meetings where there wasn't a presentation of annual
19 financial reporting? Was there ever a meeting that
20 happened less than four weeks after the last meeting?

21 All of those facts are relevant to a fair
22 determination by you as to whether this process that
23 happened sometime between the end of April and mid May in
24 2023 was appropriate under the bylaws.

25 THE COURT: Ms. Kaplan, in the prior years in

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1 April, did they have the elections in April?

2 MS. KAPLAN: I only know what they produced and
3 from what I produced, there were not regular dates for
4 these meetings. They don't seem to follow a regular
5 pattern. They're all over the lot. There's very little
6 formality, your Honor, from what we can see that affixes
7 to the way the meetings are run and how they go.

8 THE COURT: So --

9 MS. KAPLAN: One more thing. The attorney
10 who's advising them of all this was Mr. Iseman's attorney
11 as well and they hid from him, for many months, the fact
12 that he had recused himself because of the obvious
13 conflict involved.

14 If your Honor were to find the attorney was
15 acting in a way that violated his duties to two clients
16 at the same time, which may well be the case, given what
17 Mr. Iseman filed at the very last minute, that also would
18 create concern, I believe, in your Honor's mind, whether
19 this was appropriate; and, one of reasons why Mr. Iseman
20 wasn't counseled by his attorney, he just found out just
21 before this happened, his attorney recused himself and
22 wouldn't talk to him about these things.

23 THE COURT: Okay.

24 MS. KAPLAN: Every indicia of an inappropriate
25 process that was done as part of conspiracy to get him

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1 off is not consistent with the way they operated, not
2 consistent with the bylaws, not consistent with past
3 practice exists here and, your Honor, again, under
4 blackletter law, under 3211(a)1 this is not the thing
5 you're supposed to be deciding under their own
6 self-serving papers.

7 It is not a deed or mortgage. It's not a
8 contractor that is self executing.

9 THE COURT: They're bylaws. The bylaws are
10 certainly a contract.

11 MS. KAPLAN: You can't do it just on the bylaws
12 or based on their self-serving e-mails.

13 THE COURT: I'm not so convinced in terms of,
14 again, what I'd be using the e-mails for is that he had
15 notice. That is established by the e-mails and also to
16 the extent that maybe you could tell me that the meeting
17 minutes, for example, don't correspond to what actually
18 happened. Mr. Iseman hasn't said a word, and it is
19 frequent that I see, in the context of a 3211, that if
20 you want to refute documents that are submitted or
21 e-mails, there is an affidavit.

22 There's something that says, Judge, this is not
23 what happened. This is manufactured. It's untrue.

24 MS. KAPLAN: We didn't put in an affidavit
25 because an affidavit is completely inappropriate under--

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1 if your Honor wants an affidavit from Mr. Iseman, I don't
2 think it's appropriate under 3211(a)1. That is why I did
3 not submit one.

4 THE COURT: It's not necessary, to be clear.

5 It is not and it is true that the documentary
6 evidence, again, has to utterly refute but why would I
7 question the board minutes when he was at the meeting and
8 he doesn't give me reason to question that he voted for
9 the directors or that he had notice?

10 MS. KAPLAN: He wasn't at the beginning of the
11 meeting deliberately, your Honor, where they reconstrued
12 the meeting. So, there was no longer the-- originally,
13 this was the annual meeting. This is the annual meeting.
14 It's undisputed, given the minutes. Then they say they
15 will have an election.

16 Again, this is all happening within a period of
17 five, six days total and given the past practices of this
18 foundation, it's not appropriate on this record for you
19 to say that A, it's the annual meeting. They can do it
20 this way and not engage in a conversation about whether
21 they had retroactively reclassified it.

22 B, all their own self-serving statements which,
23 again, the record is clear, is not appropriate under
24 3211(a)1 motion.

25 Three, we're more than happy to put in an

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1 affidavit of what Mr. Iseman did but, really, you're
2 looking at summary judgment territory. That is why this
3 is inappropriate. Mr. Iseman can refute all this, if you
4 give me the opportunity. I couldn't find a single
5 authority that would suggest to me that was proper to
6 submit on this motion.

7 THE COURT: I think there is a case called
8 Ravello or something along those lines that says I can
9 consider it in terms of at least showing me that the
10 documentary evidence is refutable or in an attempt to
11 amend or salvage a complaint that is defective.

12 It is very common that I do see affidavits to
13 that effect, but, again, it's neither here nor there.
14 It's not mandated but it certainly could be done. Here's
15 my question, and I was trying to ask it before.

16 Assuming, again, that I am convinced, for the
17 moment, that the bylaws were satisfied, is all lost based
18 on the Not-For-Profit Corporation Law Section 720
19 provision that in order to have standing, you have to be
20 a director?

21 MS. KAPLAN: No, Your Honor. As your Honor,
22 knows, New York has developed a common-law doctrine and
23 special interest standing and that the Court of Appeals
24 in the 2005 case of Consumers Union said that doctrine is
25 necessary in order to relax the usual rules of standing

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1 in cases where charitable interest is involved.

2 My friends on the other side try to argue it's
3 limited to a specific context; but, when you read the
4 Court of Appeals decision, it's clear they talk about,
5 generally, when a charitable event is involved.

6 THE COURT: Any time? Because that seems like
7 it would swallow the rule.

8 MS. KAPLAN: Excuse me?

9 THE COURT: It can't be any time a charitable is
10 involved.

11 MS. KAPLAN: No, of course not, but it is not
12 that it's limited only to the facts of Consumer Union
13 either, which is their interpretation of the language.
14 Considering whether the special interest doctrine
15 applies, of course, look at the following factors:

16 Is there a sufficiently cognizable stake in the
17 outcome to cast a dispute capable of the resolution? Mr.
18 Iseman more than satisfies this for more than three
19 reasons.

20 One, Mr. Iseman was very close to his aunt. It
21 is not just family ties alone. Ms. Frankenthaler trusted
22 Mr. Iseman so much she chose him to be co-executor of his
23 estate. She put him as a trustee on this board, which he
24 sat on for more than 20 years before his improper ouster
25 and improper plans to get rid of the foundation

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1 altogether; and, other jurisdictions have looked, as they
2 should, at 20 years of service on the foundation.

3 Someone as being quite significant, for example, if you
4 look at the DC Court of Appeals case in the Family
5 Federation for World Peace 129, A3d, 234 at 244.

6 My friends on the other side suggested the
7 Court's ruling in that case was based on the plaintiff's
8 status as trustees. That is not true. The actual words
9 of the decision say status, both as trustees and as
10 directors. That's at 241/42.

11 THE COURT: Okay.

12 MS. KAPLAN: Second reason why special interest
13 standing is appropriate here has to do with the risk to
14 the foundation. New York Courts using New York
15 common-law take an expansive standing when a plaintiff
16 with close connections to a charitable organization
17 challenges an attempt to close or convert that
18 organization for another purpose.

19 So, when you're talking about a limiting
20 principal, your Honor, if you look at Court of Appeals
21 cases where this is happening, it's very often in a
22 situation where there is a proposal to basically get rid
23 of a foundation. That is true in Consumers Union where
24 the Court says this is common in a situation where
25 they're likely to get one shot decisive transaction in

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1 the life of a nonprofit entity.

2 It's true in other Court of Appeals cases,
3 including the Alco Gravure case, in which there was also
4 problems with charitable organizations. Consumer Union
5 was about employer plans and the Court found special
6 interest standing for beneficiaries of the plan because
7 it was converted from not-for-profit to a for profit--

8 THE COURT: In Consumer Union, though, I think
9 the Attorney General had an interest in the case because
10 it involved a statute that was passed, and the board had
11 a disability there too in terms of there was no one else
12 who could prosecute the case.

13 So, that is what the Consumer's Union and Court
14 took into account there and here, I have no reason why
15 the Attorney General could not prosecute or get involved
16 or bring an action in this scenario. Maybe the Attorney
17 General is exactly what would be or could be the only
18 one, considering there are no other directors currently
19 who are persuing this.

20 MS. KAPLAN: The AG didn't step in the Alco
21 Gravure case. There is no question there about them
22 defending the New York State statute. Very similar,
23 here, they intervened and the Court found their lack of
24 intervention because of the risk to the survival to that
25 charitable entity justified the plaintiffs from having

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1 standing.

2 THE COURT: Alco Gravure also involves specific
3 distribution of funds that the plaintiffs there have an
4 entitlement to distributions of funds themselves and that
5 Mr. Iseman does not have that same entitlement here.

6 MS. KAPLAN: I think that is the exact opposite
7 way. Mr. Iseman here stands nothing to gain from this
8 case. Not a penny, not a nickel. His intentions have
9 only to do with his aunt's legacy in the pursuit of
10 survival of the foundation and his interest is more
11 consistent with special interest standing than it was for
12 people who are looking to get money out of it.

13 He's actually similar to the AG in this case and
14 doing it for the public interest of the United States.

15 THE COURT: This isn't like a KeySpan--

16 MS. KAPLAN: Foundation--

17 THE COURT: There is no private right of action
18 for someone who cares about the legacy or standing is
19 statutory other than the special interest exception, but
20 I don't know that there's ever been recognition of such a
21 broad special interest exception that someone who has
22 good motives, like really pure motives and cares a lot.

23 MS. KAPLAN: It is not just that, your Honor.
24 That was the last thing I raised. We talked about
25 different factors. He is executor of the will, the

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1 nephew, on the board for 20 years. He strongly objected
2 to closing this foundation. Both Court of Appeals cases
3 are about closing foundations, shutting down charitable
4 entities. The NYAG in this case, including the cases
5 where they were defending the statute, wasn't
6 intervening, and the last difference, your Honor, pointed
7 out to say special interest standing doesn't apply, is he
8 doesn't have interest in getting money.

9 I think that cuts the opposite way. He's not
10 doing this out of any selfish interest. He is doing it
11 to protect the future of the foundation. On top of that,
12 we now have reason to believe that serious harm to this
13 foundation may actually have occurred or already been
14 occurring.

15 As your Honor is aware, in connection with the
16 order to show cause, we asked a very simple question of
17 counsel for the foundation. Please confirm to us that
18 Ms. Frankenthaler's masterpiece from the early part of
19 her career, Mountains and Sea, has not been given or
20 otherwise transferred in order to get retrospective on
21 the centennial of her birth.

22 One of the reasons that it's very concerning is
23 it is her masterwork. B, it would be highly unusual to
24 get a painting of that value in order to get a
25 retrospective and three, Ms. Frankenthaler was a bit of a

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1 New York snob and felt very strongly her work should be
2 distributed in New York perpetually at the top museums.

3 In response to that, Ms. Neuner, as is her
4 right, refuses to so confirm. If there is concern about
5 Mountain and Sea, she refuses to confirm there is an
6 issue with Mountain and Sea and unless this case is
7 litigated, the Mountains and Sea is gone, your Honor, the
8 most important work of Ms. Frankenthaler's career and the
9 most important work of the entire movement in
10 20th-Century art.

11 So, this is hard to imagine a stronger case for
12 special understanding given the true threats to get rid
13 of the foundation, improper removal of Mr. Iseman after
14 the second threat was made. Mr. Iseman's longstanding
15 history, both on the board and with his aunt and his
16 aunt's intentions and the fact he's doing this because he
17 thinks it's the right thing to do to honor his aunt's
18 legacy, not because he's a beneficiary who will get some
19 money out of it.

20 On top of that, you have a concern about one of
21 her greatest earlier masterpieces and all those
22 circumstances, your Honor, it's hard to imagine a better
23 case with special interest standing, and, I know your
24 Honor knows this, but New York common law is
25 intentionally and deliberately flexible enough to

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1 accommodate that.

2 I know the Judge you clerked for believed that
3 strongly and I know it's the truth under New York common
4 law, and the potential risk here that this foundation
5 could disappear and there'd no longer be a Helen
6 Frankenthaler foundation and would no longer be what this
7 great artist wanted, something for her legacy for future
8 people to understand her work and what she did, is
9 exactly the kind of risk that Your Honor should say
10 allows special interest standing and allows this case to
11 go forward.

12 THE COURT: Okay. All right. Let me hear from
13 Ms. Neuner.

14 MS. NEUNER: Good afternoon, your Honor. Thank
15 you, very much for having us here. We appreciate the
16 time you're giving to us. I will be laser focused on
17 standing.

18 Very briefly, I would like to acknowledge our
19 clients who are attending. We have the Chair, Lise
20 Motherwell, who you may see. We also have Clifford Ross,
21 who is a director and the president of the foundation.
22 We also have Michael Hecht, who was one of the original
23 members of the board going back 40 years named by Ms.
24 Frankenthaler and we have Elizabeth Smith, who is the
25 executive director.

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1 Your Honor, let me go to the items that you were
2 addressing with Ms. Kaplan. You are 100 percent right
3 that three documents conclusively establish that Mr.
4 Iseman does not have standing. It is the bylaw; it is
5 the notice of the meeting; and, it is the minutes of the
6 meeting.

7 So, the bylaws, just as you were going through
8 with Ms. Kaplan, established the procedure. They were,
9 in fact, followed to a T. We have the e-mail from Ms.
10 Motherwell-- sorry. Let me back that up -- Dr.
11 Motherwell establishing that there was notice on Monday,
12 May 15th of 2023 to the full board that there would be an
13 annual meeting.

14 That is the only e-mail that I suggest needs to
15 be recognized and, your Honor, under the First Department
16 precedent, which continues to grow, even since we
17 submitted our briefs. If the e-mail is essentially
18 undeniable, meant it's recognized as documentary evidence
19 under 3211(a) and here we have not only an undeniable
20 sending of it but we actually have Mr. Iseman alleging
21 that he received it. That's in paragraph 12 of the
22 amended complaint.

23 So, you can just work from the face of the
24 complaint there and-- but, as you pointed out, he also
25 responded and on the same day that he responded, he

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1 himself raised, in the re line, which was interesting,
2 his request for the agenda, and I'll give the exact words
3 because you rightly focused in on this.

4 Same day, Monday, May 15th. Subject line:
5 "Please, is there an agenda for the Friday meeting and
6 annual meeting? Please."

7 He then received, from the foundation employees,
8 the agenda and you see that in our Exhibit G that was
9 from Mr. Benson, the next day, May 16th, and the agenda,
10 as you rightly noted, states that the annual meeting
11 actions would take place, which includes the election of
12 the directors and officers, and then you have the day
13 before, Thursday the 18th, Dr. Motherwell sending an
14 e-mail on behalf of her, Mr. Ross, and Mr. Hecht, a note
15 of advance consideration saying "we will not be
16 re-electing you. We will not be supporting your
17 renomination."

18 You see she tries to offer a gracious exit.
19 It's Mr. Iseman's prerogative not to take that but they
20 gave advance notice. In the bylaws, I think you can see
21 that even for a special meeting, there only needs to be
22 two day's notice.

23 So, having notice on a Monday of a meeting on a
24 Friday, certainly surpasses the time and, as you went
25 through with Ms. Kaplan, there are provisions that

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1 control how the notice is to be given. The notice can be
2 given by e-mail, that is clear as well.

3 Then, as to the acceptance by Mr. Iseman, you
4 can see that in the bylaws under Section 7, you were
5 parsing this language, if a director attends the meeting
6 without protesting prior thereto, which he didn't do, or
7 as commencement, which he didn't do, the lack of notice
8 to him or her, then the notice is deemed fine.

9 What was very interesting, because I was
10 listening closing to what Ms. Kaplan was saying that
11 Mr. Iseman deliberately did not show up on time. That
12 was an interesting concession. So now we know he
13 deliberately did not show up on --

14 MS. KAPLAN: Clarify. I never said that. Your
15 Honor asked that question. I did not say that and there
16 is no record of that. That was --

17 THE COURT: It doesn't even matter. It doesn't
18 matter. He wasn't there.

19 MS. NEUNER: Okay.

20 THE COURT: He came. He voted.

21 MS. NEUNER: Yes and not only did he vote, your
22 Honor, but when you see the minutes, he actually was
23 trying to have the board see things his way. He put up a
24 contrary voting proposal. Right? So, when it comes down
25 to it and when he joins, he put up a resolution to elect

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1 all of the foundation's current directors to serve for an
2 additional one-year term; and, you see that the at the
3 top of page 3 of the minutes on the second paragraph.

4 So, he was participating in the annual meeting
5 as an annual meeting. As you point out, he proceeded to
6 vote. Three different votes were taken and Dr.
7 Motherwell called for the votes. First, Michael Hecht.
8 Mr. Iseman votes yes. Second, Clifford Ross. Mr. Iseman
9 votes, yes. Then Dr. Motherwell. Mr. Iseman votes yes.
10 He's participating in the annual meeting.

11 So, the bylaws are being followed really to a T
12 and the result is that Mr. Iseman nominates himself.
13 There is no second. They told him before they wouldn't
14 support a nomination. There is no second. There is no
15 vote. He's not reelected. There's no cause that has to
16 be shown for not reelecting.

17 And one point I'm going to circle back to and
18 help you out. You were, I think, your Honor, looking at
19 Article 5 --

20 THE COURT: I was mistaken. I will state very
21 clearly I was mistaken. I do see that it's a different
22 section but the removal of the directors have to be for
23 cause. There's a statute to that effect, too. Yes, I
24 was in the wrong section.

25 MS. NEUNER: No sweat.

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1 THE COURT: What I want to know is, what if
2 there is some type of nefarious purpose in terms of he is
3 upset about the trajectory, about how the foundation is
4 going, and they want him out. They want him out. They
5 were very explicit in terms of we are not -- we don't
6 want you to be a director.

7 What if there is that agenda there to not have
8 him be a director?

9 MS. NEUNER: There is no invented standing by
10 virtue of a conspiracy to not reelect. That is number
11 one. What he said is right. The standing for nonprofit
12 is statutory, unless you get the special interest
13 exception. The special interest exception does not apply
14 to Mr. Iseman.

15 I'll go back to that. If you have concerns like
16 what if I have concerns about the way the foundation is
17 being run or Mr. Iseman not being on, the answer is New
18 York Attorney General. The New York Attorney General is
19 not prohibited from taking action.

20 Ms. Kaplan helped us all by giving us on Friday
21 a copy of the correspondence with the New York AG
22 Charities Bureau. So, that is actually very helpful.
23 Mr. Iseman is fully capable and ably represented by two
24 different counsel in presenting their concerns to the New
25 York Charities Bureau.

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1 What actually was useful to see was the New York
2 Charities Bureau responded right away. Now, the New York
3 Charities Bureau did not say the AG is unable to proceed
4 here.

5 You talked about the case where that was so on
6 Consumer Union where the AG was boxed out by virtue of
7 the legislation. So, that is not the situation here.
8 The AG's response was purely timely. It said we are
9 aware that there is a pending lawsuit.

10 In fact, it was mentioned in Mr. Iseman's
11 presenting letter to the AG. So, we're not going to
12 parallel track this. To her credit, Ms. Kaplan says the
13 AG was not taking action at this time. So, we would
14 submit, as you know, that Mr. Iseman does not have
15 standing and so, therefore, this Court doesn't have
16 jurisdiction and, therefore, this litigation would go
17 away.

18 That doesn't mean Mr. Iseman is silenced. He
19 can go back to the AG's office and say my litigation is
20 no longer in existence. I would like you to look at
21 these issues and for the foundation's part, we're happy
22 to work with the AG. We feel really confident and proud
23 of the work that has been done.

24 I won't go into the documentary evidence showing
25 that all of the transactions that have been focused on --

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1 THE COURT: I am not touching the merits of this
2 case at this point. This is not failure to state a cause
3 of action, motion to dismiss, to be sure, and, again, I'm
4 focused solely on standing.

5 MS. NEUNER: Perfect. So, those merits can all
6 be presented to the New York Attorney General Charities
7 Bureau. That is where it should have started to begin
8 with but, here, we are with you and we're happy to be
9 with you, but the question is, is this case properly
10 before you.

11 I would submit no, your Honor. It's just not
12 because it's not a situation where Mr. Iseman is a
13 current director, and the New York statute 720 is very
14 clear about who has the standing. So, he's not a current
15 director or officer. So, he doesn't have the capacity to
16 sue under 720.

17 THE COURT: What about the special interest
18 standing?

19 MS. NEUNER: Perfect. Let's do that. When you
20 look at the cases, and I think you were already lively to
21 this. There's limits, and the most salient point you
22 said is this is not a KeySpan situation nor is there a
23 private Attorney General right of action.

24 So, the special interest cases, and there are
25 not many of them, provide for standing where the claimant

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1 has an interest in the actual proceeds. When you go
2 through the cases, the person was a designated
3 beneficiary or the person had a preference in the
4 waterfall of distributions. That is the Trustco Bank
5 Lally case.

6 In Smithers, it was a special standing for a
7 donor who was policing the execution of the gift. The
8 donor had died but the wife was in good standing and in
9 fact she was given standing by another court in order to
10 pursue that cause of action.

11 Consumers Union is a case of its own because of
12 the interaction between the Attorney General and the
13 legislature, and the foundation, also, was not going to
14 be taking action because of that legislation which
15 granted them immunity.

16 The Federation For World Piece, that is a decent
17 case where they're given standing across the board to
18 ousted directors and so forth. Now, Mr. Iseman is not an
19 ousted director. He's a director that wasn't reelected.
20 He wasn't removed, so there is no cause here.

21 Dr. Motherwell was right. The board had the
22 capacity to elect or not elect for any reason at all. As
23 you saw in the documentary evidence, there was reason and
24 it was Mr. Iseman's behavior and conduct that was not
25 becoming of a board member, and I'll leave it there and

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1 not take a step further but he knows that.

2 THE COURT: To be clear, I don't care. As in,
3 the issue is is either he was properly not reelected or
4 not. I don't see any issue in terms of compliance with
5 the bylaws here. There was no election of directors in
6 April.

7 There was notice that there was going to be an
8 annual meeting, and the documentary evidence establishes
9 notice, to be clear, and his e-mail establishes that he
10 did, in fact, have notice. He participated in the
11 meeting, his directorship was subject to reelection at
12 the next meeting.

13 He was not reelected; and, in terms of the
14 special interest doctrine, I mean, first of all, I looked
15 to see who the defendants are in this case too. The
16 defendants, I think one of them is the nephew. One of
17 them was her personal accountant, perhaps. One of them
18 was her stepdaughter. I'm going to stop there.

19 I don't know if I'm missing anyone but they all
20 had a close connection, and a close relationship with her
21 and I looked at the cases involving the special interest
22 standing, and I worry about any expansion to include this
23 close relationship that would either swallow the statute
24 or, also, it doesn't fit into the exceptions that the
25 common law has already recognized.

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1 You know, a party to a contract, someone who is
2 entitled to distributions from the charitable fund.
3 Situations where the Attorney General is unavailable. I
4 taken into account, too, Mr. Iseman was on the board, I
5 think, since 1994.

6 I mean, he has standing to raise issues for a
7 very, very long time, and this doesn't come up until he's
8 not reelected and, perhaps, again, that is exactly the
9 significance. The Attorney General would be the correct
10 party to look into what's going on with the foundation
11 and is everything on the up and up; but, the point is,
12 the statute is clear in terms of no standing.

13 The special interest standing doctrine doesn't
14 allow for relationships to take precedent. On that
15 basis, I do find that the documentary evidence utterly
16 defeats the first cause of action, and the derivative
17 claims and the remaining claims, there is no standing to
18 assert them.

19 This determination, to be clear, is in no way on
20 the merits of anything involving the actual foundation;
21 and, transcript of this proceeding is to be e-filed by
22 the movants within 45 days.

23 This renders motion sequence motion sequence
24 number 2 moot in terms of conduction or conduct and
25 investigations, and I think it also resolves motion

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sequence number 3 as well.

I thank you for the spirited argument, and I enjoyed all of your papers. I wish you well. Have a good day.

MS. KAPLAN: Thank you.

MS. NEUNER: Thank you.

* * *

Certified to be a true and accurate transcript of the above matter



Lisa M. De Crescenzo
Official Court Reporter

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